SUPREME COURT OF THE UNITED STATES.

NO. 185.

RALLS COUNTY, PLAINTIFF IN ERROR,

vs.

JOSEPH M. DOUGLASS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT.

This action was brought upon coupons alleged to have been detached from three sets of bonds purporting to be obligations of Ralls County in the State of Missouri. 139 coupons of $50 each were detached from bonds in the form of Exhibit A, set forth at page 7 of this statement, and in the record at page 122.

The remaining 506 coupons were detached from bonds of $100 or $500 in the form of Exhibit B, set forth at page 8 of this statement, and on page 122 of record.

Plaintiff's petition set out that defendant, by certain bonds dated February 10, 1870, signed by N. S. Dimmitt, the then presiding justice of the County Court of said Ralls County, attested by Mayhall, the then clerk of said County Court, sealed with the seal of said court, and duly countersigned by the agent of said county, promised to pay to the St. Louis & Keokuk Railroad Co. or bearer, five hundred dollars. Plaintiff made part of his petition a copy of said bond marked Exhibit A.

Plaintiff's petition further declared upon coupons

alleged to have been detached from bonds purporting to have been paid June 13, 1871, and said counts contained averments similar to those already repeated, excepting that the first payment of interest on the bonds was alleged to have been made *June 13, 1872.*

The coupons were all in the form set forth on page 10 of this statement and page 124 of record, excepting numbers of bonds and dates of maturity. The plaintiff's petition merely alleged that plaintiff was the bearer of instruments sued on.

The general answer of defendant denied that defendant in anywise made or owed the bonds or coupons described in plaintiff's petition, and traversed each of plaintiff's allegations, and, moreover, averred that the plaintiff was not a holder for value of instruments sued on. This averment of the answer was neither traversed by plaintiff's reply, nor demurred to.

Defendant set up several special defenses, among which were the following:

6. For further answer to plaintiff's petition, defendant avers that the pretended bonds and coupons in plaintiff's petition described were wrongfully issued and delivered by one Nathan S. Dimmitt, under the pretended authority of an act of the General Assembly of the State of Missouri, entitled "An act to establish courts of probate in the counties of Ralls, Jasper, Livingstone, Barton, Lawrence, Wright, Nodaway, Chariton, Mississippi, New Madrid, Pemiscott, Christian, Johnson, Buchanan, DeKalb, Butler, Howell, Stoddard, Webster, Sullivan, Warren, Linn, Phelps, Carter, Grundy, Scott and Oregon, define their jurisdiction and provide for the election of judges of probate," Approved March 19, 1866; and of a pretended act of the General Assembly of the State of Missouri, entitled "An act concerning county courts and the justices thereof, in the counties of Ralls, Jasper, Livingstone, Barton, Lawrence, Wright, Nodaway, Chariton, Mississippi, New Madrid, Pemiscott,

Christian, Johnson, Buchanan, DeKalb, Butler, Howell, Stoddard, Webster, Sullivan, Warren, Linn, Phelps, Carter, Grundy, Scott and Oregon," approved March 19, 1866, which last named act never became a law, in conformity to the requirements of the 23d and 24th sections of Art. IV of the constitution of the State of Missouri then in force; and that long before the issue or delivery of said pretended bonds or coupons, the General Assembly of the State of Missouri, by an act entitled "An act to amend an act entitled 'An act to establish courts of probate in the counties of Ralls, Jasper, Livingstone, Barton, Lawrence, Wright, Nodaway, Chariton, Mississippi, New Madrid, Pemiscott, Christian, Johnson, Buchanan, DeKalb, Butler, Howell, Stoddard, Webster, Sullivan, Warren, Linn, Phelps, Carter, Grundy, Scott and Oregon, define their jurisdiction, and provide for the election of judges of probate, approved March, 1866," approved March 25, 1868, abolished the probate court of Ralls County and vacated the judgship of said court; and that for the reasons stated, said bonds and coupons were and are null and void.

8. Further answering, defendant avers that said pretended bonds in plaintiff's petition described, purport upon the face thereof to have been issued under orders of the county court of Ralls County, dated March 3, 1869, or February 8, 1870, or June, 15, 1871, to subscribe certain sums of money *to aid in the construction of the St. Louis & Keokuk Railroad*, being nearly twelve years after the date of the alleged incorporation of the St. Louis & Keokuk Railroad Company as set forth in plaintiff's petition; defendant avers that the corporators named in said alleged act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the St. Louis & Keokuk Railroad Company," approved February 16, 1857, did not accept the terms of said incorporation, or thereunder organize or begin the transaction of business within a period of ten years next after

the date of the said act of incorporation, and that all powers contained in the 29th section of said alleged act of incorporation had ceased to exist on the 3d of March, 1869, and on the 8th of February, 1870, or June 13, 1871, and that at said dates it was not lawful for the county court of any county through which the route of said railroad, as projected by the terms of said act, "may be or might lie" to subscribe to the capital stock of said company, or to issue bonds therefor, without previously obtaining the assent of two thirds of the qualified voters of said county, at a general or special election to be therein held, which assent defendant avers was not obtained, and which election defendant avers was not held.

To which plaintiff filed the following demurrer:

Demurrer to part of Answer.

Now at this day comes the plaintiff, by his attorneys, and demurs to the sixth defence of defendant's answer, and for grounds of demurrer says that the said defence does not contain facts sufficient to constitute a defence in law to this action, for the reason that—

1. The official conduct of Nathan S. Dimmitt, as justice of the county court of Ralls County, can not be gainsayed or denied in this action, and because the title of said Dimmitt to said office of presiding justice of the county court of Ralls County can not be tried in this action, and because the said Dimmitt, having held the said office of presiding justice of the county court of Ralls County, and exercised the functions thereof, defendant can not now be permitted to question in this action the validity of the acts of said county court while so presided over by said Dimmitt, on the ground of any defect in the title of said Dimmitt to said office.

2. The judge of the probate court of Ralls County was, by the law of the State of Missouri in force at the time of the execution of the bonds from which the coupons were detached, *ex officio* presiding justice of the county court of Ralls County.

And plaintiff demurs to the eighth defence of defendant's answer, and for grounds of demurrer says the facts

therein stated are not sufficient in law to constitute a defence to this action, for the reason that defendant can not, in this action, deny the legal existence of the St. Louis & Keokuk Railroad Company at the time of subscribing stock to said company, and because the defendant, having dealt with said railroad company in its corporate name, is estopped to deny its corporate existence.

Which demurrer the Court sustained, subject to defendant's exceptions.

Thereafter a trial was had.

The plaintiff offered in evidence an act of the General Assembly of the State of Missouri entitled, "An act to incorporate the St. Louis and Keokuk Railroad Company, containing the following sections relevant to the issues involved in this case.

SEC. 1. A company is hereby incorporated, called the St. Louis & Keokuk Railroad Company, the capital stock of which shall be six millions of dollars, to be divided into *shares of one hundred dollars* each; the *holders of which*, their successors and assigns, *shall constitute a body corporate and politic*, etc; shall be able, in law and equity, to make contracts, and may make by-laws and regulations proper and *necessary to carry into effect the provisions of this act, not repugnant to the laws or constitution of the United States, or of this state.*

SEC. 2. J. R. Barrett, etc., or any nine of them, shall constitute the first board of directors under this act, and shall hold their office until their successors be qualified. They shall, *within ten years* after the passage of this act, meet and organize as a board of directors; *and when organized*, they shall cause books to be opened for the *subscription* of the *capital stock* of said company.

SEC. 3. So soon as fifteen hundred shares shall be subscribed, the directors shall cause an election to be held for nine directors, etc.

SEC. 9. Providing for the delivery of certificates of stock to subscribers.

SEC. 11. The said corporation shall make an annual report to the secretary of state, of the operations of the year ending on the first day of December; which report shall be verified by the oath of the treasurer and acting superintendent of operations, and be filed in the office of secretary of state by the third Monday in December of each year, and shall state: first, the capital stock, and the amount actually paid in, etc.

SEC. 26. Said company shall commence the construction of said road within ten years from the passage of this act. etc.

SEC. 29. It shall be lawful for the *county court of any county in which* any part of the route of said railroad may be, *to subscribe to the stock of said company;* and it may invest its funds in the stock of said company, and issue the bonds of said county to *raise funds to pay the stock thus subscribed*, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends.

SEC. 33. The operations of said company shall be confined to the general business of locating, constructing, making and using said railroad and the acts necessary to carry the same into complete and successful operation.

SEC. 35. Said company shall have power to mark out, locate and construct a railroad from some suitable point on the North Missouri Railroad, not exceeding thirty miles west of St. Charles, in St. Charles county, by way of *Louisiana* in *Pike county*, Hannibal in Marion county, and Canton and Lagrange in Lewis county, to some point near the mouth of the Des Moines river, on the northern boundary of the state, on a line the most suitable and advantageous as regards distance, grade, cost of road, and permanent value of same when completed, between

the town of St. Charles and the city of Keokuk, in Iowa.

SEC. 36. This act and the company hereby incorporated, are exempted from the seventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth sections of this first article of the act concerning corporations, approved November 23, 1855.

This act to be in force from and after its passage.

The seventh section of the first article concerning corporations, from the operation of which said charter was exempted, reserved the right to repeal, alter or suspend any charter thereafter granted.

The sixth section of said act of November 23, 1855, not excepted from application to said charter nor entirely repealed by implication, but at best merely modified so as to *allow ten years* for organization, instead of *one* year, provided, R. C. 1855, p. 371, "if any corporation hereafter created by the legislature, shall not *organize* and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease."

The Court admitted said act against defendant's objection that plaintiff had failed to show that the defendant was at the dates of the alleged contracts, a county in which any part of the route of said St. Louis & Keokuk railroad was or may be. Plaintiff then offered in evidence three sets of bonds purporting to be identical with those described in plaintiff's petition, corresponding therewith as to numbers. The first set of bonds from which the petition alleged 139 coupons of fifty dollars each to have been detached, was in the following form:

EXHIBIT A.

UNITED STATES OF AMERICA.

STATE OF MISSOURI, COUNTY OF RALLS,

No. 7.] [$500

The County of Ralls in the State of Missouri, hereby agrees to pay the St. Louis & Keokuk Railroad Com-

pany or bearer, the sum of five hundred dollars in ten years from the tenth day of February, A.D. 1870, with interest at the rate of ten per centum per annum, payable annually on the tenth day of February in each year, at the National Bank of the State of Missouri, in St. Louis, Mo., on presentation and surrender of the proper annexed coupon. This bond is issued under the authority of an act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the St. Louis & Keokuk Railroad Company," approved February 16, 1857, and in pursuance of an order of the county court of said Ralls County, dated February 8, 1870, to subscribe two hundred thousand dollars to aid in the construction of the St. Louis and Keokuk Railroad; *and this bond shall be countersigned by the agent of said county before the delivery thereof.* For the payment of this bond the faith and credit of said Ralls County is irrevocably pledged.

In testimony whereof the president of said county court has hereto subscribed his name, and the same is attested by the clerk of said court, and the seal of said court affixed hereto, this tenth day of February, A.D. 1870.

Five hundred (500) dollars.

[SEAL OF RALLS COUNTY COURT.] N. S. DIMMITT,
Presiding Judge of Ralls County Court, Mo.

Attest: GEO. E. MAYHALL, *Clerk.*

Countersigned "N. S. Dimmitt, agent of Ralls County."

The bonds from which the remaining coupons sued on were detached were for sums of $500 or $100, and in the following form, except as to amount.

EXHIBIT B.

UNITED STATES OF AMERICA.

STATE OF MISSOURI. COUNTY OF RALLS.

(Coat of arms.) (Seal.)

No. 438.] [$500

The County of Ralls, in the State of Missouri, hereby agrees to pay the St. Louis and Keokuk Railroad Company, or bearer, the sum of five hundred dol-

lars, in ten years from the thirteenth day of June, A.D. 1871, with interest at the rate of ten per centum per annum, payable annually, on the 13th day of June in each year, at the National Bank of the State of Missouri, in St. Louis, Mo., on presentation and surrender of the annexed coupon. This bond is issued under the authority of an act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the St. Louis and Keokuk Railroad Company,' approved February 16, 1857, and in pursuance of an order of the county court of said Ralls County, dated March 3, 1869, to subscribe two hundred and seventy five thousand dollars to the capital stock of the St. Louis and Keokuk Railroad Company, an order amendatory thereof, made by said court, dated June 13, 1871; *and this bond shall be countersigned by the agent of said county before delivery thereof.* For the payment of this bond the faith and credit of said Ralls County is irrevocably pledged.

In testimony whereof the president of said county court has hereunto subscribed his name, and the same is attested by the clerk of said court, and the seal of said court affixed hereunto, this 13th day of June, A. D. 1871.

Five hundred (500) dollars.

[SEAL OF RALLS COUNTY COURT.] W. E. HARRIS,
President of Ralls County Court, Mo.

Attest:

GEORGE E. MAYHALL, *Clerk.*

Countersigned "Richard Dalton, agent of Ralls County."

The defendant duly objected to the admission of each of these bonds in evidence, because neither of same had been filed with the suit.

That said bonds were not shown to have been executed by the county court of Ralls county; that the bonds of February, 1870, purported to be signed by N. S. Dimmitt, as *presiding judge* of *Ralls County court*, and not as president of the county court of Ralls County; that the execution of neither of said bonds nor the power or authority for their execution had been proven; that as shown by the record, neither of said bonds had ever

been stamped as required by the revenue laws in force when they were issued, and could not be received in evidence without further steps to validate said evidence, each of which objections the Court overruled, subject to defendant's exceptions.

Plaintiff then offered in evidence coupons detached from said bonds, each of which was in the following form, excepting number of bond or date of maturity of interest or amount thereof.

50. STATE OF MISSOURI. 50.

The county of Ralls will pay to the bearer the sum of fifty dollars at the National Bank of the State of Missouri, in St. Louis, Mo., for annual interest due February 10, 1877, on Bond No.——for five hundred dollars.

GEO. E. MAYHALL,
Clerk of Ralls County Court.

Defendant duly objected to the admission of each of said coupons, because neither of them had been filed with the petition on the sixteenth of July, 1878, that neither of same had been stamped with a revenue stamp as required by law, and that no proof had been made as to the authority of the person signing same to bind the county.

Plaintiff offered in evidence a paper purporting to be a certified copy of the bond and coupon register of Ralls County, Missouri, for the purpose of showing that the county court of Ralls County had paid interest upon bonds therein described during the years 1871, 1872, 1873, 1874, and 1876.

Objected to as incompetent testimony as to said alleged payments; that such a registry did not establish payment of interest; and as incompetent evidence because said facts had not been pleaded as an estoppel, could only be so pleaded, not in chief but in reply, and said evidence should have been offered in rebuttal and not in chief; all of which objections the court overruled and permitted said certificate to be read in evidence; to

which action of the court the defendant then and there excepted.

Said registry contained the following headings and certificate, and one line of each issue of bonds is given, the other lines being similar, there being one line for each bond issued:

134 Date of bond.	Date of Issue.	No.	Class	Designation or Purpose.	Am't of bond.	To whom Issued.
Feb'y 10, 1870.	Feb'y 10, 1870	1	1	Subscription to St L. & K. R. R.	500 00	St. Louis & Keokuk Railroad Co.
June 13, 1871..	June 13, 1871 .	401	2	Subscription to St. Louis & Keokuk R R.	500 00	St. Louis & Keokuk Railroad Company.
June 13, 1871..	June 13, 1871..	1	2	Subscription to St. Louis & Keokuk R. R.	100 0	St Louis & Keokuk Railroad Company.

Bonds when payable.	Interest.		Am't of Coupons.	Number of Coupons.					
	Rate.	When payable.							
	Per ct.								
Feb'y 10, 1880.	10	Annually.....	50 00	No. 1. Paid	No. 2. Paid	No. 3. Paid	No. 4. Paid	No. 5. Paid	No. 6 Paid
June 13, 1881.	10	Annually.....	50 00	No. 1 Paid	No. 2. Paid	No. 3. Paid	No. 4 Paid	No. 5.	No. 6.
June 13, 1881.	10	Annually	10 00	No. 1. Paid	No. 2. Paid	No. 3. Paid	No. 4. Paid	No. 5,	No. 6.

STATE OF MISSOURI,

County of Ralls, ss.

I, W. B. Stevens, clerk of the county court within and for the county of Ralls, state of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the bond register of said county, containing entries of all payments of all coupons paid by the county of Ralls for interest upon railroad bonds of said county issued February 10, 1870, and June 13, 1871, as the same appears of record now remaining in my office.

Witness my hand as clerk, and the seal of said court hereto attached.

Done at office in New London, this twelfth day of September, 1878.

[Seal.] W. B. STEVENS, Clerk.

Plaintiff offered no evidence in support of his allegation that defendant received the stock of said railroad company nor any other evidence than as herein stated excepting depositions admitted, subject to defendant's exceptions, tending to show that the coupons sued on were detached from bonds offered in evidence, and that plaintiff bought bonds and coupons in 1874, 1875 and 1876 without notice of fraud or wrong, and relying solely upon the recitals in the bonds. Plaintiff having closed his case, defendant requested the Court to instruct the jury that upon the case as made by plaintiff he could not recover, which instruction the court refused, subject to defendant's exceptions.

Defendant offered evidence, all of which was excluded, subject to defendant's exception.

The assignment of errors herein makes it unnecessary to refer to the same, as error is not assigned for the exclusion of said evidence.

It will be observed that the petition does not allege that the bonds were issued by the county court of said county, as authorized by Sec. 29 of the act incorporating the St. Louis & Keokuk Railroad Company, but that said bonds were issued by *said county* under the authority of said act.

The petition averred that said county received the stock of said railroad company in an amount equal to the bonds issued by it and paid the interest on all of said bonds as the same fell due from February 10, 1871, to February 1876, on one set of bonds, and from June 13, 1872, to June, 1876, on the other sets or bonds.

In no defense set up by defendant was it admitted that any subscription to the stock of the St. Louis & Keokuk railroad company was ever made by Ralls county or by the county court of Ralls county. Nowhere was it admitted that any one claiming to act as a county court of Ralls county accepted any certificate of stock in said pretended St. Louis & Keokuk Railroad

Company, or paid any interest on the bonds before February, 1872.

Plaintiff's petition shows that he only claimed that interest on the June bonds was paid between the thirteenth of June, 1872, and June, 1876.

Plaintiff offered no evidence of any orders of county court to subscribe stock or issue bonds, or of any acceptance of stock, or of any payment of interest upon any bond, either by the county of Ralls or by the county court of Ralls, other than the alleged register

Section No. 158, of Chapter 184, of U. S. Statutes at large, Vol. 14, pages 142 and 143, declared invalid and void any unstamped instrument for the payment of money. Sec. 163, declared same inadmissible in evidence. Sec. 154, of the same chapter, page 141, U. S. Statutes at large, Vol. 14, provided that all official instruments issued by the officers of any state, county, etc., shall be exempt from taxation, "in the exercise only of functions strictly belonging to such state, county, etc., in their *ordinary* government and *municipal* capacity."

Under the charge of the court set forth in the assignment of errors, the jury found for plaintiff and judgment was entered against defendant for $17,125.42.

Defendant moved for a new trial and in arrest of judgment, as shown by the record at page 140, which motions having been overruled, and defendant's bill of exceptions made part of the record, the case was brought here upon writ of error.

Powers of County Court.

The constitution of Missouri of 1820, Sec. 11, Art. V, in force until July 4, 1865, provided that "inferior tribunals shall be established in each county, for the transaction of all county business." R. S. Mo, 1855, Vol. 1, p. 78, Sec. 12, Art. V.

From time to time, by statutory enactments, vari-

ous tribunals, beginning with the court of Quarter Ses sions, and ending with County Courts, have been charge with the transactions of county business, in addition t other duties.

Not until the adoption of the constitution of 186 was it provided in the organic law that said inferio tribunals should be *known* as *county courts*. R. S. Mo 1865, p. 38, sec. 23, Art. 6.

The only relevant section of general law in referenc to powers of county courts in force in 1857, has been con tinued in force *verbatim* to the present time.

"The said courts shall have control of the property real and personal belonging to the county, shall hav full power to purchase and receive by donation any prop erty, real or personal, for the use and benefit of th county; to sell and cause to be conveyed any real estate goods or chattels belonging to the county, and to audi and settle all demands against the county."

R. S. Mo., 1865, p. 555, Sec. 9.

Nowhere is it declared that the county court is th unlimited agent or representative of the county. 36 M **R. 561.**

An act published as a law of Missouri, entitled "An act concerning county courts and the justices thereof in the counties of Ralls and other counties therein named approved March 19, 1866, provided:

SECTION 1. The County Courts of the counties of Ralls, etc., shall be composed of *two menbers*, to be styled the *justices of the county court* and the judge of probate, who shall be *ex officio president* of the county court.

This act to *take effect* from and after the first Tuesday after the first Monday, in November, 1866.

Before the date fixed for the taking effect of said act by a part of the R. C., 1865, it was provided: (R. S. Mo., 1865, p. 555):

SEC. 1. The county courts shall be composed of three members, etc.

SEC. 3. At the next regular election for county justices in *each county* in this state the qualified voters thereof shall elect three justices of the county court, who shall qualify as required by law; and of the justices so elected, one shall vacate his office at the end of two years, and one shall vacate his office at the end of four years, to be determined among such justices by lot, etc. And in each county in this state all the *offices of county court justices of such county* are declared vacant upon the day of the next regular election for any *one* or *more of such justices* for *that county*.

SEC. 12. The *justices* of the *county court* or *a majority* of them shall *choose one* of *their number* to *be president* of the court.

SEC. 11. A *majority* of the *justices* of the county court shall constitute a quorum to do business, a single member may adjourn from day to day and require the attendance of those absent, etc.

R. C. 1865, Title XXXIII, p. 537, Sec. 5. All courts included under this title shall be courts of record and shall keep just and faithful records of their proceedings.

SEC. 6. Full entries of the orders and proceedings of all courts of record, of each day, shall be read in open court on the morning of the succeeding day, except on the last day of the term, when the minutes shall be read and signed by the judge.

The Supreme Court of Missouri in 1867, interpreted this law as vacating all offices of county court justices in Missouri, on the sixth of November, 1866.

State v. Mann, 41, M. R., 365.

It is conceded that if said act, entitled "An act concerning county courts and the justices thereof in the counties of Ralls, etc., became a law, it was only necessary to elect two *justices* of the *county* court in Ralls county, but it will be contended that the legislature did

not and could not, by said act, confer upon the judge of probate power as a third member of said court to make orders alone, or otherwise.

Sec. 9, of Art. 2, of the constitution of Missouri, then in force. (R. S. Mo., 1865, p. 26), provided that "no person shall assume the duties of any state, county, city, town or other office to which he may be appointed, otherwise than by a vote of the people."

The general assembly of the State of Missouri by an act approved March 19, 1866, laws of Missouri, 1866, page 83, established probate courts in the counties of Ralls, and twenty-six other counties therein named, said court to be composed of one judge, who shall be styled judge of probate.

By an act of the General Assembly of the State of Missouri, approved March 24th, 1868, the act of March, 1866, establishing a probate court in the county of Ralls, etc., was amended, so as to exempt the counties of Ralls, Jasper and Stoddard from the provisions of said law: and all conflicting laws repealed. (Laws of Missouri, 1868, page 277.)

The Probate Court of Ralls County having been thus abolished, and there being *no office* of probate judge, the legislature, on the 4th of March, 1869, for the purpose of omitting DeKalb County therefrom, amended Sec. 1 of the act of 1866, so that it was again declared that the county courts of the counties of Ralls, etc. shall be composed of two members, to be styled the justices of the county court and the *judge of probate*, who shall be *ex officio* president of the county court.

This was the *status* when Dimmitt, as is confessed by the demurrer, wrongfully executed and issued the bonds and coupons described in the sixth count of the answer. The bonds of February 10, 1870, thus issued by Dimmitt, were in the form of Bond A, at page 7 of this statement.

Afterwards, on the 18th of March, 1870, the General

Assembly of the State of Missouri, by an act approved March 12, 1870 (Laws of Missouri, page 225), again amended the law concerning probate courts; and again, by the amendment, recognised the amendment of 1868, exempting Ralls and other counties from the law establishing probate courts.

On the 18th of March, 1870 (Laws of Missouri, 1870, p. 220), the General Assembly amended the special act concerning county courts, declaring that the general law should thenceforth apply to the county court of Ralls county.

From 1865 until 1875, the constitution of the State of Missouri contained the following frequently quoted provision, Sec. XIV, Art. 11, which may prove relevant in this case:

The general assembly shall not authorize any county or town to become a stockholder in, *or to loan its credit* to any company, association or corporation, unless two thirds of the qualified voters of such county, city or town at a regular or special election to be held therein shall assent thereto.

R. S. of Mo., 1865, p. 43.

Sec. 17, of Chapter 63, R. S. of Mo., 1865, p. 338, declared it lawful for the county court of any county to take stock for such county, etc., in, *or to loan the credit* thereof to any railroad company, *duly organized* under this or any other law, provided that two-thirds of the qualified voters of such county, etc., at a regular or special election to be held therein, shall assent to such subscription. (The special charter power appears at page 18 of this statement.)

On the thirtieth of January, 1872, (Laws of Mo., p. 76) the General Assembly of the State of Missouri, by an act entitled, "An act to repeal certain sections of law, granting to county courts and other corporate bodies the power to subscribe stock to railroad companies, repealed section 29 of the act of the General Assembly of the State

of Missouri, incorporating the St. Louis & Keokuk rai
road company, approved February 16, 1857, which se
tion 29 contained the power of any county court to sul
scribe stock and issue bonds to the St. Louis & Keoku
railroad company. Sec. 2 of said act provided that th
county court of any county in this State shall not eith
change or modify the conditions of any order of suc
court authorizing a subscription to the State of any rai
road company without having obtained a two-thirds vo
of the county interested, at a special election held fo
that purpose, authorizing such alteration, change o
modification. This act took effect from the date of i
passage, January 30, 1872. (Laws of Mo., 1872, p. 76.)

By a law, taking effect February 16, 1872, entitled
"An act to protect counties, cities and incorporate
towns from combinations between railroad companie
county courts, etc., it was made a felony for any justic
of a county court thereafter to vote, to subscribe stock o
loan the credit of such county to any railroad company
unless authorized so to do by a two-thirds vote of th
qualified voters of such county, etc.

Laws of Missouri, 1872, p. 19.

Fifty-six years ago there was printed in the genera
statutes of the State of Missouri, a law entitled, "An ac
to enable counties to make contracts," which law ha
ever since remained in force, and is the only authorit
under which a county of Missouri may now sue or b
sued.

Section 5 provides that the county court may
appoint an agent to make any contract on behalf of suc
county for erecting any county building or for any othe
purpose authorized by law, and the contract of such
agent duly executed on behalf of such county shall bin
such county.

R. S. Mo., 1855, p. 502, Sec. 5.
R. S., 1865, Sec. 3, Ch. 37, p. 225.

ASSIGNMENT OF ERRORS.

1. The court below erred in sustaining plaintiff's demurrer to the sixth defence of defendant's answer, set forth at page 2 of statement.

2. The court below erred in sustaining plaintiff's demurrer to the eighth defence of defendant's answer, set forth at page 3 of statement.

3. The court below erred in admitting in evidence the several bonds of February, 1870, against defendant's objections that the same had not been filed in the said suit; that same had never been stamped with revenue stamps; that the power and authority for their execution had not been shown that the same were signed by N. S. Dimmitt as presiding judge of Ralls county court, and not as president of the county court of Ralls county, and that same did not purport or appear to be executed by the county court of Ralls county.

The authority of the county agent who countersigned bonds was neither recited in the bonds or proved on the trial.

4. The court below erred in admitting in evidence the bonds of June, 1871, against defendant's objection that said bonds had not been filed with said suit; that neither the execution of said bonds nor the power and authority for their execution had been shown.

5. The court below erred in admitting in evidence the several bonds of February, 1870, and June, 1871, against defendant's objection that the same had not been stamped with a revenue stamp, as required by law at the dates of their alleged execution.

6. The court below erred in admitting the coupons sued on against defendant's objections that the same had not been filed with the suit; that the same had not been stamped with a revenue stamp as required by law, and that no proof had been made as to the

authority of the person who executed the same to bind the county.

7. The court below erred in admitting, against defendant's objection as to their incompetency and irrelevancy, depositions of Joseph M. Douglass and Wm. S. Douglass to the effect that the plaintiff bought the coupons sued on and the bonds from which they were detached, for value, and without notice of the fraud and wrong practiced by the persons who executed and issued same, and relying upon the facts recited on the face of the bonds, although no issue as to said facts had been made by plaintiff, either in his petition or reply.

8. The court below erred in admitting in evidence the paper purporting to be a copy of the bond and coupon register of Ralls County, set forth at page 11 of statement, against defendant's objection that the same was incompetent testimony, and did not establish payment of interest, and because the allegation in support of which said evidence was offered had not been pleaded as an estoppel.

9. The court below erred in the following portion of the charge to the jury: "The court instructs the jury that if the coupons sued on were detached from the respective bonds offered in evidence, (you have testimony on that point), and that the plaintiff was the holder thereof, at the commencement of this suit, then the plaintiff is entitled to recover," because it precluded the jury from passing upon and determining various issues of fact, joined as to the power and authority of the persons who had undertaken to execute the instrument sued on, and thereby bind the defendant, and virtually declared that plaintiff, under the pleadings, and by the evidence offered, had established the existence of said power and authority.

10. The court below erred in refusing the following declaration of law asked by defendant:

1. "The jury are instructed that in order to justify a judgment for plaintiff against the defendant in this case, the jury must be satisfied from the evidence that there existed on and after the third of March, 1869, a corporation *organized* under the provisions of act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the St. Louis & Keokuk Railroad Company," approved February 16, 1857. If the jury believe from the evidence that such a corporation never existed, the *alleged* acts of the county court of Ralls county as recited in the bonds from which coupons sued on are alleged to have been detached, can not bind the defendant, because, in the absence of such evidence, as to the existence of said corporation, the county court of Ralls County was not, in making said bonds, the agent of said county.

11. The petition did not state facts sufficient to constitute a cause of action in this, that it did not allege that the county court executed and issued the bonds of the county as required under the charter power, but alleged that the county, which had no power under said law to issue bonds, did issue the same, and did not set forth the authority of the persons who countersigned bonds as agent of Ralls county.

POINTS AND AUTHORITIES.

I.

Under the pleadings in this case the court below erred in sustaining the plaintiff's demurrer to the sixth defence of defendant's answer. See page 5 of statement.

This court in County of Dallas v. McKenzie, 94, U. S. 662, 663, after recognizing the prevalent system of pleading in Missouri as allowing numerous, and even inconsistent defenses, holds that a declaration similar to plaintiff's petition in this cause involves two fundamental propositions: first, that the charter of the company gave authority to the county to subscribe, and, second, that the county exercised that authority; "both these averments are jurisdictional, and if either does not exist no bonds can legally issue. The second is a matter of fact to be determined on the pleadings or the proof. The power to the county court to subscribe is not a self-executing power." Under the twenty-ninth section of the charter of the St. Louis & Keokuk Railroad Company it was the *county court* of any county, which might subscribe stock. It was the *county court* which might issue bonds of the county, to raise funds to pay for such subscription.

When the bonds were issued, the settled law in Missouri was that the county court was not, as in other states, the unlimited agent or representative of the county

Reardon v. St. Louis Co., 36 M. R., 561 (1867).

Neither in this case, nor in Dallas County v. McKenzie, was there any verified plea of *non est factum*; in each case there was a special denial of each material allegation of plaintiff's petition; it is true that in the latter case plaintiff demurred to all the defenses, but I hope to show that in this case the sixth defense in itself was sufficient. The sixth defense sets up that cer-

tain bonds were wrongfully executed and issued by one Dimmitt, under the pretended authority of a law approved March 19, 1866, (Laws of Mo., 1866, p. 84) establishing in Ralls and other counties a probate court, separate and distinct from the county court, which probate court should consist of one member to be styled "*judge of probate*," and of another act purporting to have become a law on the nineteenth of March, 1866, (Laws of Mo., 1866, page 82), which declared that the county court of Ralls and twenty-six other counties shall be composed of two members, to be styled the justices of the county court, and the judge of probate, who shall be *ex officio* president of said court. The answer sets up that by law approved March 24, 1868, (Laws of Mo., 1868, 276), the office of probate judge was abolished, and that the act of 1866 declaring the probate judge *ex officio* president of the county court never became a law in conformity to the 23d and 24th sections of Art. IV of the constitution of March, 1865, which read as follows:

STATE OF MISSOURI, XXIII. Every bill shall be read on three different days in each house, unless two-thirds of the house where the same is pending shall dispense with this rule, and every bill having passed both houses shall be signed by the speaker of the House of Representatives and by the president of the Senate.

XXIV. No bill shall be passed, unless by the assent of a majority of all the members elected to each branch of the general assembly; and the question upon the final passage shall be taken immediately upon the last reading, and the yeas and nays shall be taken thereon and entered upon the journal.

The sixth defense sets out that the only authority for the execution and issue of the bonds by *one* Dimmitt depended upon the two acts referred to. If for any reason which courts may judicially notice, said acts conferred no authority upon said Dimmitt as probate judge to execute and issue the bonds, the answer was sufficient. The only objections to the sixth defense which can be considered are those set forth in the demurrer.

Wagners' Missouri Statutes, Vol. 2, pages 1014 1015 and 1018, Secs. 6, 7 and 20.

Plaintiff's demurrer to this defence sets up one of the seven statutory grounds of demurrer authorized by the law of Missouri, viz: that the sixth defence "does not state facts sufficient to constitute a defence," and in explanation of his understanding of said pleading added matter substantially assuming that the title of Dimmitt as judge of the probate court of Ralls county, and as *ex officio* president of the county court of Ralls county, could not be inquired into, because "the said probate judge was by law in force at the time of the execution of the bonds sued on, *ex officio* presiding justice of the county court of Ralls County. Plaintiff probably relies upon the grounds, first, that the constitutional provisions violated in the passage of the act declaring that the judges of probate were directory and not mandatory; and may cite in support thereof Pacific R. R. Co. vs. The Governor, 23 Mo. R. 353, involving the construction of a less stringent provision of a previous constitution of 1820, and subsequent *dicta* of the Supreme Court of Missouri in cases involving neither the constitution of 1820 nor that of 1865. Secondly, the passage of an amendment to said act of March 4, 1869 (Laws of Mo., 1869, p. 165), for the purpose of exempting DeKalb county from its operation. Thirdly, the passage of the law of March 18, 1870, (Laws of Mo., 1870, p. 220,) recognizing the fact that Ralls county had not previously been governed by the general law concerning county courts, and declaring it thenceforth subject to such general law. Fourthly, the doctrine that Dimmitt's acts were those of a *de facto* officer and protected by the established doctrine upon that subject.

No question concerning the constitutionality of the act declaring the judge of probate *ex officio* president of the county courts of Ralls, etc., has ever been presented to the supreme court of Missouri. In a case probably

relied upon by defendant in error, involving the term of office of a *justice of the county court* of Johnson county, the supreme court of Missouri confined its ruling to a declaration that a section of the general law concerning allotment of term of office could not be applied to such justice of the county court. The court evidently did not regard the judge of probate as one of the justices of the county court

State v. Windsor, 45 Mo. R., 348.

If the law did not intend to confer power upon the probate judge to act as member of the county court and alone to execute and issue bonds, the demurrer should not have been sustained.

If, on the contrary, the law intended to confer such power, and assuming that at the date of the issue of bonds of February 10, 1870, there was a duly enacted statute declaring the judge of probate of Ralls county *ex officio* president of the county court of Ralls county, the answer shows that there could be no probate judge to act as *ex officio* president of the county court, because by law of March 24, 1868, (Laws of Mo., 1868, page 277,) Ralls, Jasper and Stoddard counties were exempted from the operation of the law concerning probate courts.

If there had been a probate judge, he could not, under this law, have exercised the functions of a justice of the county court.

As the Supreme Court of Missouri remarked, in passing upon a different question growing out of this special law concerning county courts, it is impossible in many respects, to reconcile it with the general law upon the same subject. For the purposes of this case it is confessed by demurrer that the general law did not apply. If it was intended by said special act to con fer upon the judge of probate any authority as a member of the county court, the law was void because repugnant to the Section 9 of Art. II, of the Constitution of Missouri, of 1865, which remained in force until Decem-

ber 12, 1870 (nine months after the county court of Ralls county had been declared subject to the general law concerning county courts.)

This section of the state constitution provided that no person shall assume the duties of any state, county, city, town or other office to which he may be appointed, otherwise than by a vote of the people.

R. S. of Mo., 1865, page 26.

The constitution of Missouri of 1820, required the general assembly to establish in each county inferior tribunals for the transaction of all county business, but the constitution of 1865 declared that this tribunal should be known as county court. (R. C. of Mo., 1865, page 38), and authorized the establishment of separate tribunals for probate business, under which authority the General Assembly proceeded in creating the probate court of Ralls county in 1866.

The law concerning probate courts provided for the election by the people of a probate judge, but at the same general election the separate office of justice of the county court was to be voted for.

It might well happen that a man whom the people would select for probate judge would not have met their approval for the position of a member of the county court. It certainly seems unjust that a community should be threatened with ruinous debt, confessedly created by a man who, in violation of the organic law, was authorized to usurp the functions of an elective office.

If there was no office there could be no *de facto* officer; if there was no judge of probate how could there be an *ex officio* president of the county court. If the office of *ex officio* president was unconstitutional, could there be a *de facto ex officio* president? The acts of the General Assembly of 1870, declaring that the county court of Ralls county should thenceforth be governed by the general law, is a solemn admission that it had not

previously been governed by such law. If that special act concerning county courts in Ralls,&c. never became a law or was repugnant to the organic law, and consequently no law, there certainly was no authority under the admissions of plaintiff for Dimmitt alone to execute and issue the bonds. The power under the charter was to the *county court* of any county, first to subscribe stock, and *secondly*, to issue bonds.

The demurrer confesses that the sole authority for Dimmitt's execution and issue of the bonds was to be found in the two special acts cited in the answer, one of which acts, if it passed, was repugnant to the organic law, and the other of which had been repealed. Plaintiff concedes by the terms of his demurrer that the general law concerning county courts did not apply, and the Supreme Court intimate to the same effect in 45 Mo. R.; but if it did, a single member of the county court could not execute or issue the bonds without an order made by a majority of the three members. The special law did not, like the general law, provide for the determination of any difference of opinion between the members of the county court. If the two members under the special act, who were to be styled justices of the county court, were the county court, they should have united in executing and issuing the bonds of February, 1870. If the probate judge was also a member by reason of his *ex officio* presidency in the absence of any special provision in the act. (Sec. 6, of Chapter 9, R. S. Mo., 1865, page 84,) governed "words importing joint authority to three or more persons shall be construed as authority to a majority of such persons," unless otherwise *declared in the law giving such* authority.

Under this rule for construing statutes, even if the special laws referred to were in every respect valid. Dimmitt's acts, as described in the answer, were void and without authority.

The estoppel described in Weyanango vs. Ayling, :

99 U. S., 117, can not arise in the case, because only the county court, and not an unauthorized individual, could bind the *quasi* corporation known as a county. In this case the bond-holder, under the confessed defense, would have found on going to the record that Dimmitt's authority on February 10, 1870, arose, not from his being *de facto* president of the county court, or even *de facto* probate judge, but simply as an ex-probate judge, claiming to be solely by virtue of said abolished office, neither a member nor president, but *ex officio* president of the county court.

In 99 United States, 117, the records showed that at the date of bonds, the clerk Verke was an officer authorized to execute same, and that all the conditions precedent had been completed before the chairman delivered them.

There can be no *de facto* officer when there is no *de jure* office. For the reasons shown, there could be, in 1870, no *de jure ex officio* president of the county court; there was no *de jure* probate judge, nor even a *de facto* probate judge. As to the distinction between usurpers, without color of authority, and *de facto* officers, I cite

Rochester and Genesee R. R. Co. *vs.* The Clarke National Bank, 60 Barb., 234.

24 Wend., 599.

The Chancellor, in the last cited case, defines a *de facto* officer "as one who comes into a *legal and constitutional* office by color of a *legal* appointment or election." Should the executive give authority to clergymen to act as supreme judges, such clergymen would not be judges *de facto* of that court, and binding upon parties therein; on the contrary, the holding of the court by such clergymen would be the exercise of an illegal and unconstitutional power.

See especially Ex parte Snyder 64 Mo R 58

II.

The recitals on the face af the bond did not import compliance with the law.

The bill of exceptions, page 124, shows that the bonds and coupons were admitted in evidence without proof of any order of the county court, authorizing the person who executed same to represent the county court, and, notwithstanding the fact that they were unstamped, as required by the revenue law in force in 1870 and 1871.

In Missouri the county court is only the limited agent of the county, without other powers than may be conferred by statute. Defendant's general answer denied the making of the bonds, but was not verified. The omission to verify this plea merely relieved plaintiff from proving that those whose names were signed to the bond executed the same.

The bonds do not purport to be executed by the county court, but by the president of the county court, In one instance, viz: the February bonds, the person signing subscribes himself presiding judge, an office then unknown under law in Missouri, as shown in previous point. Plaintiff offered no evidence to establish the identity of the two titles, the February bonds recited an order of the county court to subscribe two hundred thousand dollars to aid in the construction of the St. Louis & Keokuk Railroad, a mode of subscription never provided for, except in the general railroad law of 1865, which also required a vote as a condition precedent.

A majority of the county court should have executed the bond or made an order delegating that power which the bond should have recited. In the absence of sufficient recitals plaintiff should have offered evidence of authority, especially as the additional point was made that the bonds were unstamped.

Upon the face of each of these bonds it was recited:

"This bond shall be countersigned before delivery by an agent of Ralls county." The law concerning county contracts in force and unchanged for more than fifty years, (R. S. of Mo., 1865, page 225,) and under which alone process against Ralls county was obtained in this case provides: Sec. 3. The county court may appoint an agent to make any contract on behalf of such county for erecting any county building, or for any other purpose authorized by law, and the contract of such agent duly executed on behalf of such county shall bind such county.

Whether or not under the charter power the county court could have issued these bonds without the countersignature of a county agent is immaterial, the bond on its face was so limited. If this peculiar recital did not make the bonds non-negotiable, (7 Wall, 415,) and therefore open to the defense confessed by demurrer, it at least established the fact that the instrument could not be completed or issued until such county agent countersigned the bond. If the failure to make a verified plea of *non est factum* left the execution of the instrument sued on as confessed, it did not confess the authority of the person who countersigned as county agent: that authority should then have been proven by the production of an order of the county court. Plaintiff failed to offer such evidence. It will be observed that 206 of the February bonds signed by N. S. Dimmitt as County Judge, were also countersigned by N. S. Dimmitt as county agent. Although I failed to show in this case that said bonds were countersigned after March 30th, 1872, as I did in the case of Douglass vs. Lincoln County, Federal Reporter of Vol. V, No. IX, 775, Judge Treat's opinion declaring the bonds void in that case is valuable authority as to the non-execution and non-issue of the bonds in this suit involved, until the bonds were countersigned. Even though the public nature of the duties of county courts may justify the theory of *de*

facto county courts, could there be a *de facto* county agent in this case?

The recitals in bonds made thirteen or fourteen years after the date of the act authorizing incorporation, should have put even a *bona fide* holder upon inquiry. The bond of February, 1870, Exhibit A, p. 122, of Record, is payable to the St. Louis & Keokuk Railroad Company or bearer. Nothing is said in said sentence about the origin or existence of the company.

In the next sentence the bond recites; "This bond is issued under the authority of an act to incorporate the St. Louis and Keokuk Railroad Company, approved February 16, 1857, *and* in pursuance of an order of the county court of said county to subscribe two hundred thousand dollars (not for stock of company, but) *to aid in the construction of the St. Louis & Keokuk Railroad*. Even a *bona fide* purchaser is warned that the bond is not issued under the authority of the charter alone, but in pursuance of an order which the charter power did not permit, but which contained the language authorizing aid to railroads under the general law, which required the assent of two-thirds of the qualified voters. (R. S. of Mo., 1865, page 338, Sec. 17.) This bond, unlike any other, (excepting the Lincoln bonds), ever issued in Missouri contained upon its face the significant warning, "this bond shall be *countersigned* by an agent of said county before delivery.

The purchaser had notice that, from the hour that the law concerning county contracts was made applicable to the execution of said bond, it became his duty to satisfy himself not only that said bond was countersigned by a person claiming to be an agent of Ralls county, but that the records of the county court showed his appointment as such agent to complete the execution of the bond. See R. S. of Mo., 1865, title County Contract, p. 225.

Douglass v. Lincoln County, Federal Reporter, Vol. V. No. IX, page 775.

Ruby v. Shain, 54 M. R., 207.

Parsons v. Jackson, 99 U. S. 436.
Anthony v. Jasper County, 101, U. S. 699.
Weil v. Greene Co., 69 M. R., ~~185.~~ 285

III.

The bonds were not only inadmissible in evidence under section 163, but absolutely void under section 158, because unstamped. See 14, U. S. Statutes-at-Large, 143, July 13, 1866: Every instrument, etc., not stamped as required by law is not voidable but void, and could only be validated by post stamping as provided in said act. It is true that since October, 1872, much of this law has been repealed, but the effect of a complete repeal of such laws is certainly not to validate instruments void when executed. See interpretation of this act in *Pugh* v. *McCormack*, 14 Wall. 361-372, 21 Wall. 324, 1874.

An instrument appearing unstamped is presumed to have been so issued—the burden of showing the contrary rests upon the holder. *U. S.* v. *Brown*, 1 Deady, 566. Collector may affix stamp and remit penalty upon proper proof, but recovery can not be had upon instrument appearing unstamped without first showing that the void instrument has thus been validated.

Platt v. Beach, 21 How. Pr. R. 188.

Bourg Cases was

The act of October, 1872, repealing obligation to stamp instruments, except bank checks, especially provided how invalid instruments already issued without being duly stamped might be rendered valid, Vol. 17, U. S. Statutes, Chapter 315. But it will be claimed that if ~~clients are~~ not saved by the alleged repeal of the law, exemption is found in Sec. 154, of Chapter 184, page 141, U. S. Statutes at large, vol. 14, act of 1866, which declares that all official instruments, documents and papers issued by the officers of any state, county, town or any other municipal corporation, shall be exempted from taxation, *provided*, that it is the intent hereof to exempt from lia-

bility to taxation such state, county, etc., in the *exercise only of functions, strictly belonging to them in their ordinary government and municipal capacity.*

Under the laws of Missouri as expounded by its Supreme court, when the instruments sued on were issued, and at all times, the execution of county bonds, by a county court under a special power in the name of *quasi* corporations known as counties, in payment for subscription to stock of Railroad companies, could not reasonably be termed a function *strictly* belonging to them in *their ordinary government and municipal* capacity. Such acts have always been recognized as extraordinary performances.

"Subscription to stock of a railroad company, and issue of bonds in payment thereof by a county court in Missouri, is a special statutory power, in derogation of common law and common right hedged about on all sides by limitations and restrictions.

State v. Saline, Co. 45 Mo.R. 249, January, 1870.
Steines v. Franklin Co, 48 Mo. R., 160, 1871.
Weil v. Greene Co., Mo. R., ~~285.~~ Co 9, 285

The bonds are not state bonds, they are not county bonds issued by county officers under general and ordinary powers, but obligations imposed upon counties without the consent of the people in obedience to a special power in a special law, applicable only to certain counties in the state, and not in the discharge of the ordinary duties of said state officers. See statement, page 13 for power of county court.

When exemption from revenue tax is claimed for bonds, they should at least appear upon the face thereof to be executed by some officer known to the law. The bonds do not purport to be executed by the county court, but by the president and clerk thereof without any recital that a majority of the court by an order have authorized them to execute same, and the February bonds are not even executed in the name of the president, but by Dimmitt, as presiding judge.

IV.

The paper purporting to be a bond and coupon register, certified to by the county clerk in 1878, was not competent evidence of payment of interest by the county; no law authorized the keeping of such a record. The certificate of county clerk in 1878 is insufficient. There was no proof that any taxes had been levied or collected from the people for the purpose of paying the interest, and thus estopping the county. The time at which payment of interest was made was of importance, because, up to January 30, 1872, the laws of the state authorized county courts to levy taxes and pay interest on such bonds. The book is not certified to be a record of said county court, and if it was, the law of January 30, 1872, (Laws of Missouri, 1872, page 76), repealing the powers contained in the twenty-ninth section of the Art. incorporating the St. Louis & Keokuk Railroad Company, (Laws of Missouri, 1857, page 132), terminated the power of county courts to bind counties without a previous vote of the people, which the plaintiff, in his demurrer to the eighth defense confessed did not occur.

The petition does not pretend that any interest was paid, or could be paid, on the two sets of bonds of June 13, 1871 before *June 13, 1872*, when the power of county court to create obligations under the charter had ended, and with it necessarily ended the power of the county court to ratify an obligation which it could no longer create. Loan Assn. v. Topeka, 20 Wall., 454. It is not pretended that any law, made after January 30, 1882, delegated to county courts or county clerks, or any other officers, power to bind the county without a vote of the people. On the contrary, the law of February, 1872 (Laws of Missouri, 1872, page 19. See statement, page 18), made it a felony for any county officer thereafter to attempt to impose such obligations upon the people.

The language of Judge Napton in delivering the

first opinion in Smith vs. Clark County, 54 Mo. R., has been invoked in support of such a theory, but it seems to have sometimes escaped observation that the court at page 80 of that very case, upon a motion for rehearing, distinctly declared that "there was nothing in the opinion which will warrant the conclusion that the court considered that such power to county courts in the charter was a franchise which could not be repealed either before or after the adoption of the new Constitution," (1865), nor did Judge Napton, "in his separate opinion upon said motion for rehearing dissent from this doctrine." The original opinion in Smith vs. Clark County, at page 70, referred to this very Act of Jan'y 30, 1872, as evidence that the previous existence of the power had been recognized by said repeal, plaintiff offered no proof in support of his averment that defendant received the stock of the St. L. & K. R. R. Co. If he had offered proof of any such receipt of stock after January 30, 1872, the evidence, for the reasons previously stated, would have been incompetent proof of a ratification or estoppel upon the county. The courts judicially notice that a Missouri county is a *quasi* corporation, which, though without any general unlimited agent, can perform no act except through the medium of some agent designated by law like the county court, or by a county agent appointed by such county court for purposes authorized by law.

V.

The admission of W. G. Douglass' deposition showing that he bought for value without the notice of fraud or illegality was illegal.

After the plaintiff, who neither by his petition nor his reply pleaded that he was a holder for value or without notice, &c., confessed by demurrer, defenses which showed fraud and illegality in the inception of the instruments sued on, and thereby shifted the burden of

pleading and proof from defendants to plaintiff. (Smith vs. Sac Co. 11 Wall, 61; Daniel on Negotiable Instruments, Sec. 815, 2nd edition. Weaver vs. Barden, 49 N. Y., 286) it was too late on this trial to offer in chief depositions of Douglass and his brother averring that plaintiff bought for value without notice of the wrongs and frauds attending the alleged contracts involved in this suit. Not only did plaintiff fail to aver in his petition that he was a holder for value, not only did he fail to make such reply or averment that he took without notice defenses which shifted the burden to plaintiff, but he failed either to reply or demur, and thereby confessed defendant's specific averment that plaintiff was not such a holder for value. See defendant's general defence, record p. 100.

Under the code of practice in Missouri, a litigant after omitting to demur or reply ~~to~~ answer, waives all objections to any pleading, excepting the objection that the court has no jurisdiction of the subject matter and that the petition, answer or reply does not state any cause of action, defence or reply. (R. S. of Mo., 1865, Ch. 165, pages 658, 659, Secs. 5, 10, 15, 17.)

VI.

The eighth defense was sufficient.

Conceding to the fullest extent that any person doing business with a corporation is estopped from denying the existence of such corporation, I respectfully submit that such is not the issue presented by the eighth defense. The defense is substantially that the power of any county court to act as agent of Ralls county in making the contracts involved in this, depended at the date thereof, upon the fact that there then existed a corporation organized under the provisions of the act entitled, "An act to incorporate the St. Louis & Keokuk Railroad Company," and that to permit the establishment of such a fact solely by recitals in the bonds,

from which the coupons sued on were alleged to have been detached, would permit persons whose authority as agents depended upon a certain fact to establish such fact, and their consequent power to bind an alleged principal by false recitals in an instrument executed only by such pretended agent.

This defense was overthrown solely upon the authority of the case of Macon county v. Shores, 97 U. S. page 277. Inasmuch as this court rested said decision solely upon alleged adjudications of the question by the supreme court of Missouri in Smith v. Clark county, 54 Mo., p. 58; Kayser v. Bremen, 16 M. R. 88, which this court merely followed under the authority of Olcott v. Bymen, 17 Wall. 44, plaintiff may be permitted to endeavor to show that an issue similar to that here made was not presented by the record in either of the cases decided by the Supreme Court of Missouri, and that the language used should be considered as *dicta* of the court and not as adjudications.

Sec. 1 of said charter (Laws of Mo , 1856-7, p. 94) incorporating the A. & B. R. R. Co., provided that James Cowgill and others named shall be and are hereby created a body politic *in fact* and *in name*, by the name and style of the ~~Alexander~~ and Bloomfield Railroad Company Alexandria

The language of the entire act shows that it was intended to create a corporation *in esse*, and not one *in futuro*, as the act incorporating the St. Louis & Keokuk Railroad Company (see statement p. 5) manifestly was. It was not the corporators, but the holders of stock to be subscribed after *organization*, who should constitute a body corporate, capable of making contracts (Laws of Missouri, 1856-7, p, 126.)

The opinion in Smith v. Clarke Co., 54 Mo. R., p. 66, shows that the court recognized the fact that section 10, of the A. & B. charter imported all the privileges and immunities of the N. M. R. R. charter (Laws of Mo. 1851, p. 484). That charter allowed *ten* years after incorpo-

ration for organization, and the opinion at page 63 of 54 Mo. R., shows that it was stipulated and agreed that the Alexandria and Bloomfield Railroad Company was incorporated by the act of February 9, 1857, and subsequently on the 17th of September, 1864, seven years and seven months after the date of incorporation, *duly and legally organized.*

In Keyser v. Bremen, 16 Mo. R. 90, an examination of the statute construed, shows that under the agreed case the only issue actually involved, was the constitutionality of the said law (R. S. Mo., 1845, p. 1048,) which gave to county courts power to incorporate and organize towns or villages upon the petition of two thirds of the inhabitants of any locality. The court finds that by the proper admissions, all the facts necesary to give the county court jurisdiction were conceded by Keyser, and that the law is constitutional. The town of Bremen was clearly a municipal corporation *in esse.*

The famous case of State v. Macon County (41 M. R. 458, 1867), whilst declaring that the constitution of 1865, did not by implication repeal a power to county courts identical with that involved in this case, conceded that by apt words such power might be repealed.

In Smith v. Clarke Co., 54 M. R., 1873, where such a power was merely referred to as a privilege of the company, the court, on a motion for re-hearing expressly declared that there was nothing in the opinion which intimated that such a power was a franchise which might not have been repealed, either under the constitution of 1820 or under that of 1865.

If, then, such a power could have been repealed without destroying the franchises of the company, was it not admissible to plead that the condition precedent of organization within ten years (instead of one year as otherwise provided by Sec. 6 of Art. I on Corporations, R. S. of Mo. 1855, p. 371) had not been complied with.

VII.

Was an election a condition precedent?

Since the last decision of this court concerning said question the Supreme Court of Missouri in the case of State *ex rel* vs. Dallas County Court, 72 M. R. 330, in affirming the doctrine that Sec. 2 of "The Act of March 23, 1861," entitled "An Act Supplemental," &c., Laws of Mo., 1860-61, p. 60, prohibiting under penalty any subscription to any railroad company, avoided even in the hands of *bona fide* holders, all bonds thereafter issued under special charter powers with the assent of a majority of the resident voters, called attention to an opinion of the Supreme Court of Missouri delivered by Judge Napton in 1842, (Downing v. Rengir, 7 Mo. R. 585,) where a promissory note was declared absolutely void in the hands of a transferee, because given for a town lot before plat was recorded as required by statute, and in which the Court quoted with approval the language of Lord Holt: "Every contract, made for or about any matter or thing which is prohibited and made unlawful by any Statute is a void contract though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibiting words in the statute." The act of 1861 was a supplemental act, and not an amendatory act as stated in Judge Hough's dissenting opinion; the other objection assigned by Judge Hough is that Smith vs. Clark County, 58, 1873, decided to the contrary.

It is believed that an analysis of that decision will show that the question did not arise under the record, but if it did the case was decided in 1873, after the making of contracts involved in this case. "Decisions made by state courts after the date of contract will not bind the Supreme Court of the United States, which will

follow any decision in force when the subscription was made.

Pine Grove v. Talcott, 19 Wall. 665.

VIII.

The charge of the court was erroneous.

The charge of the court assumed that it was only necessary for the jury to determine that plaintiff was the holder of the coupons sued on, and that they were detached from the bonds offered in evidence, thus again holding that it was unnecessary for plaintiff to prove or plead that he was a *bona fide* holder, thus taking from the jury the right to determine whether or not the paper offered, purporting to be a bond register, established the payment of interest upon the bonds, and therefore holding that the power and authority of those who executed the bonds and coupons had been conclusively established.

IX.

The petition was insufficient.

The plaintiff did not aver that the county court issued the bonds of the county, as authorized by the twenty-ninth section of the charter, but alleged that the county issued the bonds without pleading or proving the authority of the agent of Ralls county who countersigned said bonds, the authority of such an agent depended upon an order of the county court appointing him agent of Ralls county for some purpose authorized by law. Such an order was neither pleaded nor proven. Under the recitals the bond could not be completed and become the deed of Ralls county until an agent of the county, duly appointed by the county court, countersigned same.

It may be that in the absence of contrary proof the counter-signature of the agent will be presumed to have been made at the date of the bond, but was there any law from which the authority of such an agent might be presumed?

Anthony v. Jasper County, 101 U. S., 699.
Douglass v. Lincoln County, Federal Reporter, Vol. V, No. IX, page 775.
Weil v. Greene County, 69 M. R., 285.

HENRY A. CUNNINGHAM,

Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881.

RALLS COUNTY,
Plaintiff in Error,

vs.

JOS. M. DOUGLASS,
Defendant in Error.

No. 185.

STATEMENT, BRIEF, AND POINTS FOR DEFENDANT.

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Supreme Court of the United States.

OCTOBER TERM, 1881.

RALLS COUNTY,
Plaintiff in Error,

vs.

JOS. M. DOUGLASS,
Defendant in Error.

No. 185.

STATEMENT.

This suit was instituted to recover the amount due on six hundred and forty-five interest-coupons detached from bonds issued by plaintiff in error for the purpose of raising funds to pay a subscription made by the County Court of plaintiff in error to the capital stock of the St. Louis and Keokuk Railroad Company.

The subscription was made and the bonds issued by authority of sect. 29 of an act of the General Assembly of the State of Missouri, entitled "An Act to incorporate

the St. Louis and Keokuk Railroad Company," approved February 16, 1857, and which section is as follows:

"It shall be lawful for the County Court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county."

The route of the road is fixed by sect. 35 of the same article, — "from some suitable point on the North Missouri Railroad, not exceeding thirty miles west of St. Charles, in St. Charles County, by the way of Louisiana, in Pike County, Hannibal, in Marion County, and Canton and Lagrange, in Lewis County, to some point near the mouth of the Des Moines River."

Interest was regularly paid on the bonds during the years 1871, 1872, 1873, 1874, 1875, and 1876, until the maturity of the coupons here sued on.

In the trial below, Douglass proved that he was a *bona fide* holder of the coupons for value before maturity.

Four defences in the answer of the county were demurred to; and it is to the rulings of the court in sustaining the demurrer, and the further action of the court at the trial in refusing to permit plaintiff in error to show the action of the County Court otherwise than by its record; in holding that the county could issue bonds bearing interest at the rate of ten per cent per annum, and in holding that the court took judicial notice of the fact that the route of said railroad lay through Ralls County, that plaintiff in error complains.

The four defences demurred to were as follows:

No. 6. Alleging that Nathan S. Dimmit, the presiding judge of the County Court of Ralls County, who signed the bonds, was not a *de jure* member of that court.

No. 7. Alleging that Ralls County had not a legal existence, because by the act organizing it, Pike County was

reduced to an area less than that required by the Constitution of Missouri, and because by various acts of the Legislature of Missouri, "defining the limits of the several counties of the State," Ralls County was reduced in area to less than that required by the then existing Constitution of Missouri.

No. 8. Alleging that the corporators named in the act incorporating the St. Louis and Keokuk Railroad Company did not accept the terms of the act, nor organize nor commence business within ten years from the approval of the act.

No. 12. Alleging that the sense of the tax-payers as to the subscription was not taken; that a majority of the resident voters had not voted in favor of the subscription, and that the subscription had not been authorized by a vote of two-thirds of the qualified voters of the county.

BRIEF.

I.

The title of Nathan S. Dimmitt to the office of presiding judge of the County Court of Ralls County, cannot be inquired into in this action.

By section 1 of chapter 137, Revised Statutes of Missouri, 1865, County Courts are composed of three members, styled "justices of the County Court." At the date of the issuance of the bond of February 10th, 1870, from which part of the coupons in suit were detached, Nathan S. Dimmitt, William E. Harris, and Nimrod Waters were acting as members of the County Court of Ralls County, with Nathan S. Dimmitt acting as presiding justice. By that court taxes were levied and collected, licenses issued, and all business of the county transacted; and not until the repudiation of these bonds was the legality of their acts questioned.

In the case of Harbaugh *v.* Winsor et al., 38 Mo. 327, the Supreme Court of Missouri say: "It is an established principle of the common law, well settled by a long and consistent series of decisions, that the acts of an officer *de facto*, though his title may be bad, are valid as far as they concern the public, or the rights of third persons who have an interest in the thing done. The rule imparting validity to the acts of a *de facto* officer is indispensably necessary to prevent the failure of justice. The business of the community could not be transacted without it; irreparable wrong would result from any other doctrine. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an officer under color of right, and to say that his acts as to strangers should be void, would do gross injustice. It would cause a suspension of business till every officer's right *de jure* was estab lished. This would not only produce inconvenience, but it would be a sheer absurdity. The law will therefore not permit official acts to be impeached collaterally. This view of the law is well settled, and we are not aware of any authority to the contrary."

The State *v.* Douglass, 50 Mo. 593;
Snyder *v.* Schram, 59 How. Pr. 404;
Bliss *v.* Day, 68 Maine, 201;
The People *v.* Weber, 86 Ill. 283;
The People *v.* Staton, 73 N. C. 546;
Ex parte Strong, 21 Ohio St. 610;

II.

The defendant is a legally existing county of the State of Missouri; of which fact all courts take judicial notice.

Ralls County was organized under an act of the Legislature of Missouri, entitled "An Act establishing the county of Ralls," approved November 16, 1820.

See Territorial Laws of Mo., p. 650.

By its establishment neither the county of Pike nor any other county in the State of Missouri was reduced in area to less than twenty miles square, and Ralls County itself embraced a district of country larger than more than one of the States of the Union.

Ralls County has never since been disorganized. In the revision of 1855 a typographical error occurs which runs through all subsequent revisions, by which the south-east corner of Ralls County is made a point in the Mississippi River where the line between townships "fifty-two and fifty-three" strike the same, instead of the lines between townships "fifty-five and fifty-six." But that the General Assembly did not intend to bring the southern boundary line of Ralls County down to the line between townships "fifty-two and fifty-three," and thus cut off a large part of the territory of Pike County, is evident from the fact that in no revision was the northern boundary of Pike County changed from the line between townships "fifty-five and fifty-six."

III.

The county cannot, in a suit on its bonds, deny the existence of the corporation to which they were issued.

In the County of Macon *v.* Shores, 97 U. S. 272, this court in a similar case has said that "the objection that the corporation was not organized within the time limited by the charter is unavailing. It is in effect a plea of *nul tiel* corporation."

State Bank *v.* Merchants' Bank of Baltimore, 10 Mo. 124;
Kayser *v.* Trustees of Bremen, 16 Mo. 88;
Smith *v.* Clark County, 54 Mo. 58;
City of St. Louis *v.* Shields, 62 Mo. 247.

IV.

It was not necessary to submit to the qualified voters of the county the question as to whether the subscription to the capital stock of the railroad company should be made by the County Court.

The charter of the St. Louis and Keokuk Railroad Company contains no provision requiring a vote to be taken as to whether stock should be subscribed, but left the matter wholly discretionary with the County Courts of the counties through which the road runs. Similar powers are contained in various charters of railroad companies in the State of Missouri, and the question of the validity of bonds issued in payment of such subscriptions has frequently been passed upon by the Supreme Court of Missouri and by this court. As stated by the court in Smith et al. *v.* County of Clark, 54 Mo. 58: "The provisions of the Revised Code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of that prohibition immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court or any individual judge thereof, so far as the reports show, not to affect the repeal of the privilege contained in special charters."

State ex rel. Mo. & Miss. R. R. Co. *v.* Macon County Court, 41 Mo. 453;
K. C., St. Joe & C. B. R. R. Co. *v.* Justices of Nodaway County Court, 47 Mo. 349;
State *v* County Court of Sullivan County, 51 Mo. 522;
State *v.* Green County Court, 54 Mo. 540;
County of Sullivan *v.* Thomas, 94 U. S. 682;
County of Henry *v.* Nicolaz, 95 U. S. 619;
County of Cass *v.* Gillett, 100 U. S. 585.

In the cases of State ex rel. Wilson *v.* Garroutte, 67 Mo.

445, and State ex rel. Barlow *v.* Dallas County Court, 72 Mo. 329, by a divided court of three to two, a contrary view of the law is now held by the Supreme Court of Missouri. But this court has frequently declared that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.

Douglass *v.* County of Pike, 101 U. S. 677.

And Judges Napton and Hugh, in their dissenting opinions in the above cases, after discussing the merits of the question, finally dismiss it with the declaration that on the faith of the prior decisions of the court large amounts had been invested, and that they considered the question had been put at rest and become a rule of property, which they had no right to disturb.

V.

The records of the County Court could not be contradicted by parol evidence.

County of Macon *v.* Shores, 97 U. S. 272.

No question is raised in this case that has not been passed upon by this court, and defendant respectfully submits that he is entitled to ten per cent damages for the vexation and delay caused by this appeal.

VI.

The County Court had the legal power to make the bonds bear interest at the rate of ten per centum per annum.

Section 2 of chapter 89, General Statutes of Missouri, 1865, provides that "the parties may agree, in writing, for the payment of interest not exceeding ten per cent per annum, on money due or to become due upon any con-

tract." But plaintiff in error contends that by section 33, page 429, General Statutes of Missouri, 1855, these bonds could bear only seven per cent interest. In the case of Beattie *v.* Andrew County, 56 Mo. 42, this very question arose, and the Supreme Court disposed of it by saying that "the bonds provided for by section 33 are issued in special cases to meet an exigency which does not occur, and has no application to the present cause. The limitation is on bonds of the description designated in the general law, and on those bonds only. The bond in this suit was issued in a different manner and under a distinct and independent grant of power; and as no limitation was imposed as to interest, it was competent for the parties to contract for any rate which the law did not prohibit."

The "grant of power" referred to in the above decision was sect. 13 of the charter of the Platte County Railroad Company, Session Acts 1852–1853, page 358, which is in the very words of sect. 29 of the charter of the St. Louis and Keokuk Railroad Company under which these bonds were issued.

VII.

Courts take judicial notice of the existence and boundaries of counties created by law, and hence it required no evidence in the court below to show that the route of the St. Louis and Keokuk Railroad Company necessarily lay through Ralls County.

State *v.* [illegible] 25 Mo. 212;
[illegible]
Buckingham *v.* Gregg, 19 Ind. 401.

[illegible]

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